

FCC Received June 17, 1996 @ 12:35 p.m.
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In Re Applications of:)	MM DOCKET No.: 96-104
SOUTHWESTERN BROADCASTING)	File No.: BRH-900315UC
)	
For Renewal of License)	
for Station KLZK (FM))	
At Brownfield, Texas)	

Volume: 1
Pages: 1 through 21
Place: Washington, D.C.
Date: June 6, 1996

HERITAGE REPORTING CORPORATION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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SOUTHWESTERN BROADCASTING)	File No.: BRH-900315UC
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for Station KLZK (FM))	
At Brownfield, Texas)	

Courtroom Number 4
FCC Building
2000 L Street, N.W.
Washington, D.C.

Thursday,
June 6, 1996

The parties met, pursuant to the notice of the
Judge, at 9:04 a.m.

BEFORE: HON. RICHARD L. SIPPEL
Administrative Law Judge

APPEARANCES:

On behalf of Southern Broadcasting Corporation:

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WITNESSES:DIRECTCROSSREDIRECTRECROSSDIRE

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Hearing Began: 9:04 a.m.

Hearing Ended: 9:45 a.m.

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P R O C E E D I N G S

9:04 a.m.

JUDGE SIPPEL: This is a pre-hearing conference set in the Southwestern Broadcasting Corporation matter, DA 96-657. I'm going to ask counsel to please note their appearances for the record. On behalf of Southwestern Broadcasting?

MR. BERNARD: Lawrence J. Bernard, Your Honor.

JUDGE SIPPEL: Good morning, Mr. Bernard.

MR. BERNARD: Good morning, sir.

JUDGE SIPPEL: And on behalf of the Bureau?

MR. SCHEIBEL: Yes. Kenneth M. Scheibel, Jr.

JUDGE SIPPEL: Mr. Scheibel. And with you is Mr. Zauner I see.

MR. ZAUNER: Yes, Your Honor.

MR. SCHEIBEL: Yes.

JUDGE SIPPEL: Good morning.

MR. ZAUNER: Good morning.

JUDGE SIPPEL: The -- I note from Mr. Bernard's notice of appearance that his client has expressed a desire to negotiate a consent order. And I think that that subject would be the first item that I want to talk about. First of all, are there any questions about Southwestern's basic statutory qualifications?

MR. SCHEIBEL: No, there aren't. No, there

1 aren't, Your Honor.

2 JUDGE SIPPEL: All right. Then are these
3 negotiations going on at this time?

4 MR. SCHEIBEL: We've had conversations, Your
5 Honor.

6 JUDGE SIPPEL: Well, just a minute. I'm going
7 to -- Mr. Bernard?

8 MR. BERNARD: Yes, sir. Mr. Scheibel and I have
9 talked two or three times, Your Honor, most recently
10 yesterday. I would -- I think that the consent order might
11 be -- although it's rarely used, I think it might be the
12 simplest way to do this. The Bureau seems to be coming down
13 on the side of perhaps a motion for summary decision. But -
14 -

15 JUDGE SIPPEL: Well those are two very distinct
16 remedies which probably would lead to entirely different
17 results. The consent order would be -- I mean, I'm -- well,
18 maybe I'm wrong on that. Maybe you're assuming for
19 procedural purposes you wanted to proceed by summary
20 decision but you basically wouldn't know where you want to
21 come out?

22 MR. BERNARD: We have -- we've talked in those
23 terms. I don't want to bind the Bureau without --

24 MR. SCHEIBEL: Well, that's so. I think the most
25 efficacious way of proceeding in this case is that we

1 believe we're on target for -- with a hearing date as you've
2 indicated. However, if counsel for Southwestern comes forth
3 with a motion for summary disposition supported by evidence
4 of its capability intent, affirmative evidence of its
5 ability to go forward and construct within the time frame
6 existing in light of the Telecommunications Act of '96 which
7 calls for automatic expiration of licenses by February 9th
8 in situations -- February 9th, '97 in situations such as the
9 present one where there will have been a silent period for
10 more than one year, since February 8th -- since February 96,
11 we would comment on that motion for summary disposition.
12 And if it's well-grounded, we would anticipate supporting
13 it. But we can't -- we're not going to get ahead of
14 ourselves by speculating on what's going to be put in front
15 of us.

16 JUDGE SIPPEL: All right. Well, what would be the
17 -- what would -- that is a -- definitely a remedy that's
18 available. But what about Mr. Bernard's suggestion on the
19 consent order. If -- I mean, just let me take this
20 hypothetically. I mean, if he could come in with his client
21 and with records and convince the -- and convince you and
22 your office that they can make this thing go before the
23 February '97 date and you have reasonable assurance, then a
24 consent order could be proposed to me and you wouldn't have
25 to go through the process of, you know, reply pleadings -- a

1 pleadings cycle. I'm just offering that as a suggested
2 alternative.

3 MR. SCHEIBEL: Yes, we've studied that question,
4 Your Honor. And the reason in the scenarios involving
5 silent stations such as this one where construction is
6 involved, in so far as the provisions of the consent order
7 rules speak toward future compliance with the law, in many
8 instances perhaps through agreement through modification of
9 station practices, we could say yes, that's -- that
10 indicates future compliance with the law. We'll consent to
11 that.

12 In here -- in this case by distinction, we believe
13 that the burden is on the licensee to go forward with more
14 than words, but actions. And so it might make the
15 enforcement of such an order to be rather cumbersome and not
16 efficacious. We believe that in similar instances where
17 silent stations have in fact returned to the air prior to or
18 during the hearing process or prior to the hearing date and
19 submitted evidence of that, we've supported termination of
20 the proceeding. So our concern is how to maintain -- how
21 the Judge can maintain control over a proceeding that's just
22 based on -- a consent order proceeding that's just based on
23 promises of future compliance and not actions.

24 MR. BERNARD: I think the order may make it easier
25 for you. You then have an order where if the order is

1 violated, you've got something to take action. I don't
2 think you even have to come back to the Judge.

3 JUDGE SIPPEL: Well, I think -- what this sounds
4 like to me is that you want to give this a little bit -- I
5 mean continue to talk about it for a few more days. And I
6 really don't have have something specific in mind myself. I
7 don't. But I -- let me maybe suggest one thing. If the
8 consent order came in -- and again, this assumes that you're
9 satisfied that there's a showing of good faith and you have
10 a reasonable assurance that this is going to work. You come
11 in with a consent order and let's say the consent -- and the
12 consent order says that by -- it has defined dates on which
13 certain things have to be done.

14 The case remains open. I've got the consent
15 order. And if they miss a date, the Bureau comes in and
16 says hey, you know, this is -- they failed to comply with
17 the consent order. We move at this time that -- you know,
18 that their license be revoked based on -- based on the
19 violation of the consent order or some -- you know,
20 hopefully that wouldn't happen. But that would be one
21 available remedy.

22 MR. SCHEIBEL: If the provision of the consent
23 order that would be implemented were violated, would that
24 beget yet another hearing on compliance with the consent
25 order? I'm just concerned that we'd get away from the main

1 issue which is the most expeditious resumption of service.

2 JUDGE SIPPEL: Well, I hear that. That's a good
3 point. What it would do with this consent order process as
4 I'm -- as I'm seeing it play out, it would give -- it would
5 put me in -- I would be sort of -- I would be supervising
6 the consent order until you were satisfied with it. If we
7 go by way of summary decision and you grant them the relief
8 that they want, it seems to me you're going to be making the
9 same judgements. You're going to be say well -- when you
10 come here, you're going to be saying well, they made a good
11 showing. If they can do certain things, we're satisfied so
12 let's dismiss the case. If they don't do it and then what
13 happens? You're going to have to probably come back in
14 again. Well, you could do one of two things. You could
15 wait until the -- until -- if they're silent past the date
16 in February, then it becomes automatic. I assume that would
17 be the Bureau's position.

18 MR. SCHEIBEL: Well, yes. We don't believe that
19 we have any discretion or the Judge has any discretion in
20 extending the license term or any subsidiary authorization
21 beyond the February date if no resumption of broadcast has
22 occurred during the year.

23 JUDGE SIPPEL: So you sort of do have by virtue of
24 that development, that -- you sort of have a -- you have a
25 built-in governance here that perhaps you're right. You

1 don't need to keep it tied up then in litigation. You can
2 get the summary decision if you think it's going to work
3 then.

4 MR. SCHEIBEL: The -- well, what we would
5 anticipate is if opposing counsel moved for summary
6 disposition supported by the kind of evidence, similar
7 evidence that they would have to support a proposed consent
8 order with, we would comment on that evidence and if we
9 agreed with it and supported it, we would ask that judgement
10 be held in abeyance until resumption of service took place.
11 And then the proceeding would terminate.

12 JUDGE SIPPEL: The same thing as a consent order
13 then. I mean, I'm not trying to argue it or take a
14 position, but either way the same papers are going to have
15 to be put together. I'm going to have to receive a consent
16 or proposed consent order with a position paper from Mr.
17 Bernard and a comment paper from the Bureau.

18 MR. SCHEIBEL: Okay.

19 JUDGE SIPPEL: And the consent order could say
20 that either this stuff is -- these things are done by
21 February something, 1997 or you're finished, or I could
22 put dates in there if you can agree to them and if I'm
23 convinced that -- or we could put sequence dates in there as
24 to when certain things have to be done.

25 MR. SCHEIBEL: That's -- we would -- we could

1 entertain that, Your Honor.

2 JUDGE SIPPEL: And you would. There would be the
3 threat that I could -- I mean, you could come in with a
4 showing and say that they deliberately walked away from the
5 obligation A which was to be done by the 1st of October, and
6 you could move -- right then you could move summarily for
7 judgement. And it would be a very short pleading that you
8 would file. I mean, Mr. Bernard could respond and then
9 bingo, I could rule, you know, by the end of October that
10 the license could be revoked hypothetically.

11 MR. SCHEIBEL: Or not renew -- in this case, it's
12 a renew -- it's a 1990 renewal application that they're
13 seeking to renew.

14 JUDGE SIPPEL: Thank you. Yes. I'm corrected on
15 that. Renewal denied.

16 MR. SCHEIBEL: Okay.

17 JUDGE SIPPEL: Either way they lose.

18 MR. SCHEIBEL: We don't have any problem with
19 that, Your Honor. Once again, it will all rest on whether
20 we can agree to what's proposed in the consent order. If
21 that's the way that counsel for Southwestern envisions going
22 forth in the most efficient way, then we won't oppose that.

23 JUDGE SIPPEL: All right. Well, let's do that
24 then. Let's set a date now. The negotiations will continue
25 to go forward now on the consent order. And how far along -

1 - how much time do you need? How much time do you need, Mr.
2 Bernard, to bring something to the Bureau that you think can
3 satisfy what your client wants to do? Let's just think in
4 terms of dates now.

5 MR. BERNARD: It would be -- the bringing of the
6 material is not difficult, Your Honor. I probably would
7 need a little more time to write it up. Today is June --

8 MR. SCHEIBEL: Sixth.

9 MR. BERNARD: -- the 6th. What you're thinking of
10 is assigning one date for a regular proposal and another
11 date for them to -- I mean, I -- what do you want to set up?

12 JUDGE SIPPEL: I'd like to -- I'd like to have a -
13 - I'd like to be able to set a date certain on what you
14 would be -- that you would be -- the parties would be
15 submitting a consent order. In the alternative, a motion
16 for summary decision. If you can't work it out, the
17 Bureau's not willing to sign off on a consent order by a
18 certain date, then you've got to come in with a motion to --
19 for summary decision. And I can adjudicate it that way, I
20 mean if you want to do it that way.

21 MR. BERNARD: Yes, I'd like --

22 JUDGE SIPPEL: You can always demand a hearing.

23 MR. BERNARD: I think that's the easiest way for
24 me and probably for you and I'm not sure it makes too much
25 difference to the Court.

1 MR. SCHEIBEL: I don't think the formal
2 distinctions here are going to amount any difference as long
3 as the substance of the proposal is similar. Under either
4 form, we can work with it and entertain it and evaluate it.

5 JUDGE SIPPEL: All right.

6 MR. BERNARD: Well, can we go off the record for
7 just a second and talk about dates. I mean --

8 JUDGE SIPPEL: Certainly.

9 MR. BERNARD: I mean, I don't have any trouble
10 with the final date but --

11 JUDGE SIPPEL: Let's do that. Let's do that.
12 Let's go off the record.

13 (A discussion was held off the record.)

14 JUDGE SIPPEL: We're back on the record. In an
15 off the record discussion, these dates were agreed to to
16 accommodate the needs of counsel and also to accommodate my
17 needs as presiding judge with respect to scheduling.

18 On June the 28th, I'm to receive a status report
19 with respect to -- just with respect to how the negotiations
20 are going for a proposed consent order. By July 15th, there
21 will be submitted to me either a proposed consent order with
22 written comments and appropriate exhibits from both
23 Southwestern and the Mass Media Bureau. If that cannot be
24 done, in other words, if a consent order -- if a proposed
25 consent cannot be agreed to by that date, then on July 15th,

1 Mr. Bernard on behalf of Southwestern will file a proposed -
2 - will file rather a motion for summary decision and a
3 comment to that either in the form of a comment or an
4 opposition to be filed by the Bureau on July the 31st.

5 Now, in my issuing those -- the order on those
6 dates, I will, of course, cancel all the dates with respect
7 to my pre-hearing order setting for discovery, exchange of
8 exhibits, hearing date, et cetera.

9 Now, Mr. Scheibel had started to discuss a
10 procedure that has been set in -- by virtue of -- well, I
11 gather it's an expedited processing procedure for the Bureau
12 as of May 1996. And I'd like you to just please articulate
13 that briefly for the record and let's find out what --

14 MR. SCHEIBEL: Yes, Your Honor. The Mass Media
15 and International Bureaus announced procedures for expedited
16 processing of applications filed by silent broadcast
17 stations. And since Southwestern falls into that category,
18 I want to alert counsel that he should regard this notice
19 and that procedures for requesting expedited processing,
20 that he needs to observe or his client needs to observe to
21 gain that kind of processing for the modification
22 application that he's identified that's necessary for him to
23 return to the air.

24 I'm mentioning that because if he wasn't aware of
25 this notice and didn't follow the procedures, his

1 application may get lost in the mix of regularly filed
2 applications and not get that expedited processing. The
3 burden is on the applicant to identify the application as
4 one that's supposed to be processed on an expedited basis.
5 So I will ask him to take a look at that and if he hasn't
6 already requested expedited treatment, to go ahead and do so
7 so that the modification application question doesn't form
8 the basis for any further delay in their plans to resume
9 operations.

10 JUDGE SIPPEL: All right. Mr. Bernard?

11 MR. BERNARD: Yes, Your Honor. On May 7, my
12 client sent to the Commission's Pittsburgh office an
13 application for permission to construct new facilities. And
14 he did indicate in there that he expected expedited
15 processing and indicated that it had taken over five years
16 to clear several engineering blocks, et cetera. I'll check
17 with the release and I'll talk with people in the Bureau and
18 make sure that they know that it's a silent application.

19 MR. SCHEIBEL: That's why I want to alert you to
20 the attention because there's a procedure here that's
21 underscored. It says a separate copy of the letter
22 requesting expedited treatment should be sent or hand-
23 delivered to the relevant address on the attached list. And
24 the attached list indicates in your case requests to
25 expedite have to be made directly to James Crutchfield in

1 the audio services division. So I want to -- I want you to
2 read the notice and make sure that you followed it so that
3 doesn't form a basis for unnecessary delay.

4 MR. BERNARD: Thank you. I will take that up with
5 Mr. Crutchfield.

6 JUDGE SIPPEL: I would also say that you should
7 file -- you should serve a copy -- a courtesy copy at least
8 on Mr. Scheibel and let him know what you're doing.

9 MR. SCHEIBEL: That's right. That would be
10 appropriate.

11 MR. BERNARD: Which leads us to another question
12 in my own mind, as -- and maybe Mr. Scheibel can enlighten
13 me on this -- because since we have to get action from the
14 processing staff before we can begin construction, do we
15 cast our order in terms of X number of days after the
16 application is granted or can we --

17 MR. SCHEIBEL: That's something we'll have to
18 discuss, Your Honor, because that other scenario involved in
19 this particular case is rather unique in that the
20 modification application was not put on file until after the
21 matter was designated. But I'm sure it's something that we
22 can discuss and figure out amongst ourselves.

23 MR. BERNARD: It really is as unique situation.
24 There's no -- we can't go back on the air without getting
25 some order from the Commission. And so we're at the mercy

1 of the staff. And ultimately, I think we're going to have
2 to fold that into a consent order in some way.

3 JUDGE SIPPEL: Well, that's what -- that's why --
4 you know, that's why there's counsel on this case. You've
5 got to -- you're the ones that -- and particular, the burden
6 is going to be on you, Mr. Bernard, to come up with some
7 very -- some workable procedures, dates certain on which
8 things can be done. And if it's an uncertain date, then --
9 then X number of days after action is taken on an
10 application. And you just -- you know, it's going to have
11 to be a lot of hard work in terms of filing these expedited
12 procedures and making a lot of phone calls and get papers --
13 handed over papers and, you know, keep it moving.

14 MR. SCHEIBEL: We agree, Your Honor. That's why
15 in the forward thinking aspect that informs this expedited
16 processing public notice, the Bureau's -- the Mass Media
17 Bureau's and International Bureau's anticipated situations
18 where licensees may run into the effect of the legislation
19 next year.

20 And in order to avoid that, this public notice
21 recites the fact that -- that although the Bureau is willing
22 to give expedited processing, and I quote from the public
23 notice, "The staff will use its best efforts to act on
24 applications timely. However, the Telecommunications Act
25 does not afford the Commission discretion to extend license

1 terms. We, therefore, emphasize that as a matter of law the
2 staff's inability to act on any application within a
3 specific time cannot prevent license expiration nor give
4 rise to any equitable claim if the license term should be
5 extended."

6 So, indeed, heroic efforts may have to be made at
7 this point. But the Bureau's position on that is that it
8 was not the actions of the Bureau that require the great
9 amount of work at this late date.

10 JUDGE SIPPEL: That's correct. This is designed
11 for Southwestern and Mr. Bernard --

12 MR. BERNARD: Well, if we have to get to that,
13 Your Honor, I think the contrary is actually true. But it's
14 certainly not necessary to bring it up here. The -- what
15 happened to this guy was not of his own making at all. He
16 never had an opportunity to put the station on the air,
17 never. There was never a frequency that he could operate on
18 during the entire time he was the owner of the station. I'm
19 willing to work all this out with the --

20 JUDGE SIPPEL: Well, did he get authorization to
21 remain silent in the process of all that?

22 MR. BERNARD: He requested that. The Commission
23 was aware that he was silent. The Commission was also aware
24 that he couldn't go back on the air. I mean, that's -- this
25 is --

1 MR. SCHEIBEL: We -- the Bureau disputes that, but
2 we're getting into the evidence of the case now and there's
3 no need to do that.

4 MR. BERNARD: Well, I -- the Bureau made a
5 statement that it was all my client's fault and I just
6 didn't want to stand on the record as being unchallenged.

7 JUDGE SIPPEL: Well, I didn't hear it that way.
8 What I heard Mr. Scheibel saying, at least as I took it, was
9 that from here on forward, the burden is going to be on --
10 the primary burden is going to be on your client to get this
11 -- these -- all these proposals in shape so that a consent
12 order can be agreed to. There's not -- so, you know, that's
13 true. I mean, you would have the burden of proceeding if we
14 go forward in the litigation. What you're telling me,
15 however, is that you know, if you feel that this case
16 should be litigated, we've got dates and we can go forward
17 on that basis, too. I mean, if your case is that strong --

18 MR. BERNARD: It makes no sense to litigate it,
19 Your Honor, because it's a lot cheaper to do it the other
20 way.

21 JUDGE SIPPEL: I agree. I agree, but, you know,
22 your relief is -- you know, there's no guarantee of relief
23 until all of it comes in. But that's your decision. Mr.
24 Scheibel?

25 MR. SCHEIBEL: Your Honor, I just want to -- as I

1 said, the Bureau is taking special steps to assist
2 broadcasters who have found themselves in this situation
3 without regard to the reasons why. And there are expedited
4 procedures. However, there is a proviso there that I think
5 bears noting because I don't think that the Bureau's
6 processing time on this particular application gives rise to
7 Southwestern's claim that -- that the burden is somehow on
8 the Bureau in this matter. So I -- that's --

9 JUDGE SIPPEL: I haven't heard any such claim.

10 MR. SCHEIBEL: Okay.

11 JUDGE SIPPEL: And I've made clear where I see the
12 situation to be at this time.

13 MR. SCHEIBEL: I understand.

14 JUDGE SIPPEL: But I do expect, of course, and
15 require that Bureau counsel and that litigation counsel in
16 this case, you're going to do everything that you can to
17 cooperate with Mr. Bernard to see to the extent that you can
18 facilitate things and get things done at the other end, you
19 know, I have to expect that also.

20 MR. SCHEIBEL: We stand ready and there will be no
21 conflicting messages. If we tell counsel that we will pick
22 up the phone and call whomever we need to to alert them of
23 this scenario, we will do that.

24 JUDGE SIPPEL: All right. Well, I think that -- I
25 think this is the very -- a very sensible way to go ahead

1 and go forward with this. And I do want to point out that
2 the -- before we close the record that the hearing date that
3 was set in this case -- and this was sent in the assignment
4 order to me by the Chief Judge -- was September 17th. So
5 under this scenario, we should -- well, if September 17th
6 was the hearing date with proposed findings and all, there
7 wouldn't be a decision coming out of this probably until --
8 not before October.

9 And under the procedures that we've outlined here,
10 even in the worse case scenario with summary decision, there
11 will be a decision out on this certainly probably before the
12 date, September 17th. So I think that efficiencies have
13 been met in terms of how counsel have approached this and
14 how we've worked out these dates. As I say, I am here. I
15 am available for telephone conferences on reasonable notice
16 or we can come back here in the courtroom if there's
17 anything that any party feels that I can do to facilitate
18 this. And please just approach this in a mediation type of
19 framework while you're doing the consent order.

20 You know, cooperation, I think, is going to be the
21 name of the game if it's -- and I mean, I'm -- you know, I'm
22 certainly familiar with all counsel here. Mr. Scheibel,
23 this is the first time that I've had your appearance, but --

24 MR. SCHEIBEL: Yes, Your Honor. It's my first
25 pre-hearing conference and we will assist both the Judge and

1 opposing counsel in the way that's appropriate in this
2 matter.

3 JUDGE SIPPEL: All right. Well, that's fine. I'm
4 very impressed with your demeanor and I'll look forward to
5 seeing the next papers. Thank you very much.

6 MR. SCHEIBEL: Thank you, Your Honor.

7 MR. BERNARD: Thank you, Your Honor.

8 JUDGE SIPPEL: We're off the record.

9 (Whereupon, at 9:45 a.m. on June 6, 1996, the
10 hearing adjourned.)

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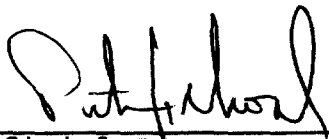
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HEARING DATE: June 6, 1996
LOCATION: Washington, D. C.

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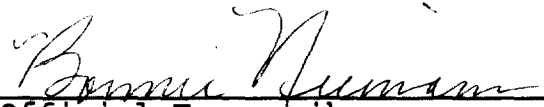


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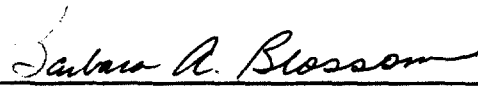


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Date: 6/14/96



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